M Kula Segaran v Datuk Seri Abdul Wahid Omar & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO 25–132–06 OF 2013
ZALEHA YUSOF J
30 JULY 2013

Constitutional Law — Executive — Appointment of — Appointments of Ministers and Deputy Ministers — Whether appointments null and void — Whether person could not be appointed Minister or Deputy Minister unless sworn in as senator — Whether appointment as Minister or Deputy Minister separate issue from swearing-in — Federal Constitution arts 43(2)(b), (6), 43A(1), 45(1), 59(1) & Sixth Schedule

In the instant ex parte application which was served on the Attorney General pursuant to O 53 r 3(3) of the Rules of Court 2012, the applicant sought to commence judicial review proceedings to, inter alia, declare that pursuant to arts 43(2) and 43A of the Federal Constitution ('Constitution'), the first and second respondents were not entitled to hold the position of Minister, and the third to fifth respondents the position of Deputy Minister, and that the respondents' appointments to those positions were null and void. The applicant contended that pursuant to those two articles, Ministers and Deputy Ministers were appointed from among members of either house of Parliament; that since the respondents were not elected in the general election to become members of the House of Representatives, they had to first become members of the Senate before they could be appointed as Ministers or Deputy Ministers. Membership of the Senate was acquired either through election by the respective State Legislative Assemblies or by appointment by the King. The applicant argued that because the respondents had not been sworn in as Senators they could not be appointed as Ministers or Deputy Ministers. The attorney general opposed the application.

Held, dismissing the application:

(1) It was a mere statement by the applicant that the respondents were not members of the Senate at the time of the swearing in. There was nothing in the applicant's affidavit to show the Yang di-Pertuan Agong had not made the appointments. The burden was on the applicant under ss 102 and 103 of the Evidence Act 1950 ('Act') to prove the allegation. In fact, the appointments being an official act, when there was no evidence to the contrary, the court may, under s 114(e) of the Act, presume that it had been regularly performed (see para 8).

(2) Under the Constitution, the appointment of a Minister or Deputy

Minister pursuant to arts 43(2)(b) and 43A(1) was a different issue from the taking of oath dealt with by art 59(1) and the Sixth Schedule. There was no provision in the Constitution which prevented appointment to the Senate before an appointee took his oath. Article 59(1) and the wording of the Sixth Schedule implied that a person had to be appointed first before he could take his oath or be sworn in. Appointment came first and the taking of oath came later. The only restriction was that until the appointee took his oath, he could not take his seat and subscribe before the President of the Senate. Similarly, a minister could be appointed but, as provided by art 43(6), he could not exercise the functions of his office before he took his oath of office (see paras 9–11).

[Bahasa Malaysia summary

Dalam permohonan ex parte ini yang mana telah diserahkan kepada Peguam Negara berikutan A 53 k 3(3) Kaedah-Kaedah Mahkamah 2012, pemohon memohon untuk memulakan prosiding semakan kehakiman untuk, antara lain, mengisytiharkan bahawa berikutan perkara-perkara 43(2) dan 43A Perlembagaan Persekutuan ('Perlembagaan'), responden pertama dana kedua tidak berhak memegang jawatan Menteri, dan responden ketiga hingga kelima jawatan Timbalan Menteri, dan pelantikan responden-responden kepada jawatan tersebut adalah batal dan tak sah. Pemohon berhujah bahawa berikutan kepada kedua-dua perkara tersebut, Menteri dan Timbalan Menteri dilantik di antara ahli-ahli sama ada Parlimen; bahawa memandangkan responden-responden tidak dipilih di dalam pilihanraya umum untuk menjadi ahli-ahli Dewan Rakyat, mereka mesti pada mulanya menjadi ahli-ahli Dewan Negara sebelum mereka boleh dilantik sebagai Menteri atau Timbalan Menteri. Keahlian Dewan Negara diperolehi sama ada melalui pilihanraya oleh Dewan Undangan Negeri masing-masing atau pelantikan oleh Agong. Pemohon berhujah bahawa oleh kerana responden-responden tidak mengangkat sumpah sebagai Senator mereka tidak boleh dilantik sebagai Menteri atau Timbalan Menteri. Peguam negara membantah permohonan tersebut.

Diputuskan, menolak permohonan:

(1) Ia hanya pernyataan semata-mata oleh pemohon bahawa responden-responden bukan ahli Dewan Negara pada masa mengangkat sumpah. Tidak terdapat apa-apa dalam afidavit pemohon untuk menunjukkan bahawa Yang di-Pertuan Agong tidak membuat pelantikan-pelantikan tersebut. Beban adalah ke atas pemohon di bawah ss 102 dan 103 Akta Keterangan 1950 untuk membuktikan tuduhan. Sebenarnya, pelantikan-pelantikan sebagai tindakan rasmi, apabila tiada keterangan bercanggah, mahkamah boleh di bawah s 114(e) Akta, menganggap bahawa ia telah dilaksanakan dengan tetap (lihat perenggan 8).

(2) Di bawah Perlembagaan, pelantikan Menteri atau Timbalan Menteri berikutan perkara-perkara 43(2)(b) dan 43A(1) adalah isu berbeza daripada mengangkat sumpah yang diuruskan oleh perkara 59(1) Jadual Keenam. Tidak terdapat peruntukan di dalam Perlembagaan yang menghalang pelantikan kepada Dewan Negara sebelum orang yang dilantik mengangkat sumpah. Perkara 59(1) dan perkataan-perkataan Jadual Keenam menyiratkan bahawa seseorang perlu dilantik terdahulu sebelum dia boleh mengangkat sumpah. Pelantikan dahulu dan mengangkat sumpah kemudiannya. Satu-satu sekatan adalah sehingga orang yang dilantik mengangkat sumpah, dia tidak dapat memegang jawatannya dan menyumbang kepada Presiden Dewan Negara. Begitu juga, Menteri boleh dilantik tetapi, seperti yang diperuntukkan oleh perkara 43(6), beliau tidak boleh menjalankan fungsi pejabatnya sebelum beliau mengangkat sumpah (lihat perenggan 9–11).]

Notes

For cases on appointments of, see 3(2) of *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2385–2387.

Cases referred to

Mohamed Nordin bin Johan v Attorney-General, Malaysia [1983] 1 MLJ 68, FC (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)

Legislation referred to

Evidence Act 1950 ss 56, 102, 102(e), 103, 114(e)

Federal Constitution arts 43, 43(2), (2)(b), (6), 43A, 43A(1), 45(1), 59, 59(1), Sixth Schedule, Seventh Schedule

Rules of Court 2012 O 53 r 3, r 3(3)

Kula Segaran a/l V Murugesan (Kengadharan a/l Ramasamy, Sivanesan a/l Achuandan and Poninusamy a/l Kalaichelvan with him) (A Sivanesan & Co) for the applicant.

Abdul Ghani Patail (Amarjeet Singh and Suzana bt Atan with him) (Attorney General's Chambers) for the respondent.

Zaleha Yusof J:

[1] This is an ex parte application pursuant to O 53 r 3 of the Rules of Court 2012 by the applicant, to commence judicial review proceedings for the following orders:

(a) a declaration that the first and second respondents are not in law entitled

to hold the position of Ministers under art 43(2) of the Federal Constitution and as such their appointments on 15 May 2013 are null and void and of no effect;

(b) a declaration that the third to the fifth respondents are not in law entitled to hold the position of Deputy Ministers under art 43A of the Federal Constitution and as such their appointments on 15 May 2013 are null and void and of no effect;

(c) that each of the respondents refund all emoluments, privileges and other pecuniary advantages obtained by them to the Government of Malaysia within seven days of the date of the order made herein;

(d) a declaration that all acts done by or under the purported authority of the respondents are null and void and of no effect.

[2] The application was served on the attorney general's chambers pursuant to O 53 r 3(3) of the Rules of Court 2012 and the attorney general has now come to this court to oppose the application.

THE APPLICANT'S CASE

[3] It is a known fact that the respondents did not stand for elections at any Parliamentary constituency during the recent General Election held on 5 May 2013. However on 15 May 2013, they were appointed as Ministers and Deputy Ministers respectively. Under art 43(2)(b) of the Federal Constitution of Malaysia, Ministers must be appointed from among the members of either House of Parliament. Likewise, under art 43A(1) of the Federal Constitution of Malaysia, Deputy Ministers must be appointed from among the members of either House of Parliament. It is the applicant's argument that the appointment of the respondents as Ministers and Deputy Ministers respectively are unconstitutional as at the time of their appointment on 15 May 2013, they were not members of either House of Parliament as they were yet to be sworn in.

THE ATTORNEY GENERAL'S OBJECTION

[4] The attorney general objects on the ground that the application is frivolous and does not disclose an arguable case that justifies argument on a substantive motion. The attorney general argues that the applicant's point is based on words that do not exist or words that he himself has added to the said articles. The attorney general cites art 59(1) of the Federal Constitution that states a person must be a member of the Senate first before he takes his oath and 'the oath' to be taken as provided in the Sixth Schedule shows that the oath is

taken by a member after his election or appointment as a member of the Senate. A

THE DECISION

[5] Both parties ie the applicant as well as the attorney general, filed in their written submissions and neither made oral submissions. I have scrutinised the cause papers and considered these written submissions. B

[6] The relevant provisions of the Federal Constitution pertaining to the issue at hand are as follows: C

Article 43(2)(b)

He (Yang di-Pertuan Agong) shall on the advice of the Prime Mmister appoint other Menteri (Ministers) from among the members of either House of Parliament. D

Article 43(6)

Before a Minister exercises the functions of his office he shall take and subscribe in the presence of the Yang di-Pertuan Agong the oath of office and allegiance and the oath of secrecy set out in the Sixth Schedule. E

Article 43A(1)

The Yang di-Pertuan Agong may on the advice of the Prime Minister appoint Deputy Ministers from among the members of either House of Parliament. F

Article 45(1)

Subject to Clause (4), the Senate shall consist of elected and appointed members as follows: G

(a) two members for each State shall be elected in accordance with the Seventh Schedule; and

(aa) two members for the Federal Territory of Kuala Lumpur, one member for the Federal Territory of Labuan and one member for the Federal Territory of Putrajaya shall be appointed by the Yang di-Pertuan Agong; and H

(b) forty members shall be appointed by the Yang di-Pertuan Agong.

I

Article 59(1)

Every member of either House of Parliament shall before taking Ms seat take and subscribe before the person presiding in the House an oath in the form set out in the Sixth Schedule, …

Sixth Schedule

I, … *having been elected (or appointed)* as a member of the House of Representatives (or the Senate) *do solemnly swear* (or affirm) that I will faithfully discharge my duties as such to the best of my ability, that I will bear true faith and allegiance to Malaysia, and will preserve, protect and defend its Constitution.

(Emphasis added.)

[7] The grounds of this application as stated in paras 9 and 10 of the applicant's affidavit in support is that the respondents were *not members* of either House of Parliament *as they were yet to be sworn in* as Senators prior to their appointment. Parties are bound by their pleadings and in this application that is the pleading of the applicant. The issue to be decided is therefore whether the respondents were members of parliament at that material time and whether being members of parliament, the respondents are required to be sworn in before their appointment as Ministers and Deputy Ministers.

[8] As the respondents were not elected in the General Election, they have to first become members of the Senate before being appointed as Ministers and Deputy Ministers respectively. To attain the status as a member of the Senate, a person either falls within one of the three modes provided by cl 1 of art 45 of the Federal Constitution. The modes are as follows:

(a) two (2) members for each State shall be elected by the Legislative Assembly for that State in accordance with the Seventh Schedule;

(b) two (2) members for the Federal Territory of Kuala Lumpur, one (1) member for the Federal Territory of Labuan and one (1) member for the Federal Territory of Putrajaya shall be appointed by the Yang di-Pertuan Agong; and

(c) forty (40) members shall be appointed by the Yang di-Pertuan Agong.

Therefore, constitutionally a person becomes a member of the Senate either by being appointed by the Yang di-Pertuan Agong or being elected by the respective State Legislative Assemblies. Although it is a known fact and in fact under s 56 of the Evidence Act (Act 56), the court must take judicial notice of it that none of the State Legislative Assemblies had met at the material time to elect its respective representative to the Senate, there is nothing to stop the Yang di-Pertuan Agong from appointing the respondents as such. There is nothing in the affidavit of the applicant which shows that the Yang di-Pertuan Agong

has not made the appointment. It is a mere statement of the applicant that the respondents were not members of the Senate at the time of the swearing in. The burden is on the applicant to prove this. Refer to ss 102(e) and 103 of Act 56. In fact the appointment being an official act, when there is no evidence to the contrary, the court may presume that it has been regularly performed as provided by s 114(e) of Act 56.

[9] It is my view from the reading of the Federal Constitution, being appointed and taking oath are two different issues. Clause 2(b) of art 43 and cl 1 of art 43A talk about appointment of Ministers and Deputy Ministers respectively. Whereas cl 1 of art 59 and the Sixth Schedule deal with oath taking.

[10] Looking at the Federal Constitution there is no provision which prevents appointment to the Senate before the appointee takes his oath. On the contrary, cl 1 of art 59 and the wording in the sixth Schedule imply that a person has to be appointed first before he can take his oath or swear in. The only restriction is that until he takes his oath, he cannot take his seat and subscribe before the President of the Senate.

[11] Similarly, a Minister can be appointed but as provided by cl 6 of art 43, he cannot exercise his function before he takes his oath of office. So the appointment comes first and the taking of oath comes later.

[12] The Federal Court in *Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68 at p 70, which was followed recently by the Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 at p 304; [2012] 4 CLJ 478 at p 492 had held that an application for judicial review may be refused if it is shown that it is frivolous and does not disclose an arguable case that justifies argument on a substantive motion. As I have said, the ground of this application is that the respondents have not been sworn in prior to their appointment. So, based on that and the reasons I have stated above, I agree with the honorable attorney general, that there is no arguable case in this application.

[13] The application for leave is therefore dismissed with no order as to cost.

Application dismissed.

Reported by Ashok Kumar